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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-408

VALERIO SANTOS and SALVADOR G. SANTOS,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No.

VALERIO SANTOS and SALVADOR G. SANTOS,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Valerio Santos and Salvador G. Santos, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 9, 1973, affirming the Judgment of the District Court, and the Order of said Court of Appeals denying Petitioners' Motion for rehearing which was entered August 7th, 1973.

OPINION OF THE COURT BELOW

Appended hereto is a copy of the opinion of the Fifth Circuit Court of Appeals.

JURISDICTION

This Court has jurisdiction under Title 28 U.S. Code Sec. 1254(1). The Judgment of the Court of Appeals was dated and entered July 9, 1973, and the Judgment denying these Petitioners' Petition for rehearing was dated and entered August 7th, 1973.

QUESTIONS PRESENTED FOR REVIEW

1. **Was there sufficient evidence at the trial of this case to sustain a conviction of Petitioners?**
2. **Was it plain error for the District Court to fail to give a cautionary instruction to the Jury as to accomplice testimony in the absence of a request for such instruction, or an objection to the Courts' failure to give such instruction?**

STATUTES INVOLVED

This case involves a conviction for violation of the following Sections of the United States Code.

TITLES 18:

Section 922(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver —

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does

not reside in . . . the State in which the licensee's place of business is located . . .

(5) any firearm or ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Section 922(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

Section 924(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000.00, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

Section 371. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof

in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both. . .

RULE 52 (b) FEDERAL RULES OF CRIMINAL PROCEDURE
PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

Petitioner Valerio Santos was convicted on thirteen (13) counts and Petitioner Salvador G. Santos on four (4) counts, of a sixteen (16) count indictment.

Counts I, IV, VII and X allege that in four (4) separate transactions Valerio Santos sold and delivered a firearm to a person not residing in the State of Texas, whom he then and there knew and had reasonable cause to believe did not reside in the State of Texas in violation of Section 922(b)(3), Title 18, United States Code.

Counts II, V, VIII and XI allege that in four (4) separate transactions Valerio Santos sold a firearm, and failed to note in records the name, age and place of residence of the Purchaser, in violation of Section 922 (b)(5), Title 18, United States Code.

Counts III, VI and XII allege that in four (4) separate transactions Valerio Santos made a false entry in records by showing one person as Purchaser, when the firearm was in fact sold to another person, in violation of Section 922(m), Title 18, United States Code.

Count XIII alleges that Salvador G. Santos aided and abetted Valerio Santos in selling a firearm to a person not residing in the State of Texas, in violation of Section 922(b)(3), Title 18, United States Code.

Count XIV alleges that Salvador G. Santos aided and abetted Valerio Santos in selling a firearm to a Purchaser and failing to note in records the name, age and place of residence of such Purchaser in violation of Section 922(b)(5), Title 18, United States Code.

Count XV alleges that Salvador G. Santos aided and abetted Valerio Santos in making a false entry in records by showing one person as Purchaser, when the firearm was in fact, sold to another person, in violation of Section 922(m), Title 18, United States Code.

In Count XVI of the indictment, Defendants, Valerio Santos and Salvador G. Santos are alleged to have been guilty of a conspiracy to violate Section 922(b)(3), 922(b)(5), 922(m) and 924(a), Title 18 of the United States Code by selling firearms to non-residents of Texas, by failing to keep records, and by making false entries in records, in violation of Section 371, Title 18, United States Code.

Both Defendants plead not guilty and were tried together on November 1st and 2nd, with a finding of guilty on all counts being returned by the Jury.

On December 12th, 1972, Valerio Santos was sentenced to concurrent sentences, being a fine of $5,000.00, and two (2) years on each of Counts I through XII, and a fine of $10,000.00 on Count XVI. Total sentence two years imprisonment and a fine of $10,000.00.

On the same day Salvador G. Santos was sentenced to concurrent sentences, being a fine of $1,000.00, and two (2) years on each of Counts XIII, XIV, XV and XVI; six (6) months to serve, remainder suspended, with three (3) year probation. Total sentence two years with six months imprisonment, balance suspended for a period of three years, and $1,000.00 fine.

There was no evidence, direct or circumstantial, tending to show or imply any unlawful conspiracy between Petitioners, except testimony presented by the Government as to Counts XII, XIV and XV of the indictment, which testimony was insufficient to support a conviction under Count XVI of the indictment, the conspiracy count.

The government's proof as to all counts in the indictment vested in a substantial part on circumstantial evidence as to the residence of the "Purchaser", and other matters, which circumstances did not reasonably preclude any conclusion other than guilt. For instance, the government's proof as to Count I was wholly insufficient to prove the actual residence of the "purchaser".

Weaknesses in the government's proof as to one transaction were, it is submitted, bolstered in the Jury's mind by unrelated proofs as to another transaction resulting in blanket conviction on all counts, and a substantial injustice to Petitioners.

The principal witnesses for the government at the trial were people who had personally signed Firearms Transaction forms at the store of Petitioner, Valerio Santos.

The Court of Appeals has held that these witnesses were not accomplices.

It is submitted that this holding is in conflict with *U. S. v. Lester*, 363 Fed. 2d 68 (6th Circuit) and *Hagerty v. U. S.*, 5 Fed. 2d, 224 (7th Circuit).

It is submitted that the government's case rested primarily on accomplice testimony, and that it was plain error under Rule 52(b), Fed. R. Crim. P. for the trial court to fail to give sua sponte, a cautionary instruction as to the weight to be given to accomplice testimony. A contrary holding would be in conflict with *U. S. v. Birmingham*, 447 Fed. 2d, 1313 (10th Circuit) and *U. S. v. Owens*, 460 Fed. 2d, 268 (10th Circuit).

This is particularly true where, as here, the great preponderance of the testimony shows Petitioners to be persons of excellent character, of long residence in the community, and with no prior criminal record whatever.

REASONS FOR GRANTING THE WRIT

This Petition for a Writ of Certiorari should be granted to prevent a miscarriage of Justice, and to resolve conflicts between the 5th Circuit and the 6th and 7th Circuits as to who is an accomplice, and between the 5th Circuit and the 10th Circuit as to the Application of Rule 52(b), Fed. Rule of Criminal Procedure to a situation where the Court has failed to give a cautionary instruction concerning accomplice testimony.

RESPECTFULLY SUBMITTED.

Jeremiah Ingels Rhodes
Attorney for Petitioners,
Valerio Santos and
Salvador G. Santos
P. O. Box R
Eagle Pass, Texas 78852

CERTIFICATE OF SERVICE

I hereby certify that on this the ____ day of August, A.D., 1973, three copies of this Petition were placed in the U.S. Mails with first class postage prepaid, addressed to James W. Kerr, Jr., Assistant U.S. Attorney, P. O. Box 1701, San Antonio, Texas, 78296, and another three copies were placed in the U.S. Mails with Air Mail Postage prepaid, addressed to the Solicitor

General, Department of Justice, Washington, D.C. 20530.

Jeremiah Ingels Rhodes
Attorney for Petitioners
P. O. Box R
Eagle Pass, Texas 78852

APPENDIX

NOTICE OF APPEAL

Filed: Dec. 21, 1972

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA

CRIMINAL NO.

versus DR-72-CR-364

VALERIO SANTOS and SALVADOR G. SANTOS

NOTICE IS HEREBY GIVEN That Valerio Santos, Defendant above named hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 12th day of December, A.D., 1972.

/s/ JEREMIAH INGELS RHODES
Jeremiah Ingels Rhodes
Attorney for Valerio Santos
P. O. Box R
Eagle Pass, Texas 78852

NOTICE OF APPEAL

Filed: Dec. 21, 1972

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA

CRIMINAL NO.

versus DR-72-CR-364

VALERIO SANTOS and SALVADOR G. SANTOS

NOTICE IS HEREBY GIVEN That Salvador G. Santos, Defendant above named hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 12th day of December, A.D., 1972.

/s/ JEREMIAH INGELS RHODES
Jeremiah Ingels Rhodes
Attorneys for Salvador G. Santos
P. O. Box R
Eagle Pass, Texas 78852

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1101
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SALVADOR G. SANTOS and VALERIO SANTOS,
Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

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(July 9, 1973)

Before BROWN, Chief Judge, DYER and SIMPSON, Circuit Judges.

PER CURIAM: Valerio and Salvador Santos appeal from their conviction of various violations of the Gun Control Act of 1968, 18 U.S.C.A. §922. We affirm.

Appellants' main contention is that there was not sufficient evidence to convict them on each count of

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

the sixteen count indictment.[1] Our review of the record convinces us that this is not true.

Appellants also contend that it was plain error for the court to fail to give a cautionary instruction as to the weight to be accorded the testimony of an accomplice without a request for such an instruction or an objection to the court's failure to give it. The answer to this contention is that the government did not rely on accomplices' testimony. The witnesses for the government may have violated Title 18, U.S.C., Section 922(a), by acquiring or assisting other purchasers to acquire weapons but each of the substantive counts, Count I through Count XV, inclusive, charged the Appellants with offenses as firearms dealers in violation of Title 18, U.S.C. Sections 922(b)(3), 922(b)(5) and 922(m). If the testimony had been offered in proof of the charges against the purchasers, a cautionary instruction as to the weight to be afforded accomplices' testimony would have been appropriate. It was clearly not called for in the circumstances present here, where none of the government witnesses knowingly corroborated with or aided or abetted either appellant. As to Count XVI, the conspiracy count, there was no evidence that any government witness was a co-conspirator or collaborated in the violations of the Firearms Act by appellants.

AFFIRMED.

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[1]Valerio Santos is charged with twelve substantive counts. Salvador Santos is charged with three substantive counts. Both appellants are charged in the sixteenth count of the indictment as co-conspirators.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1101
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SALVADOR G. SANTOS and VALERIO SANTOS,
Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(August 7, 1973)

Before BROWN, Chief Judge, DYER and SIMPSON, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

SUPREME COURT, U. S.
FILED
OCT 18 1973
MICHAEL RODAK, JR., CLERK

No. 73-408

In the Supreme Court of the United States

OCTOBER TERM, 1973

VALERIO SANTOS AND SALVADOR G. SANTOS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-408

VALERIO SANTOS AND SALVADOR G. SANTOS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The questions raised are whether the evidence was sufficient and whether the trial court erred in not giving a cautionary instruction on its own motion as to alleged accomplice testimony.

After a jury trial, petitioners were convicted of conspiracy, in violation of 18 U.S.C. 371, and of various violations of the Gun Control Act of 1968, 18 U.S.C. 922, *et seq.* Valerio Santos was sentenced to a fine of $5,000 and two years imprisonment on each of Counts One through Twelve, and a fine of $10,000 on Count Sixteen, the sentences to be concurrent. Salvador G. Santos was sentenced to a fine of $1,000 and two years imprisonment on each of Counts Thirteen through Sixteen, the sentences to be concurrent; the court suspended all but six months of the jail sentence and placed him on probation for three years. The court of appeals affirmed (Pet. App. 3a-4a).

I. Petitioners contend that there was insufficient evidence to sustain the convictions. Viewing the evidence in a light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, it was wholly sufficient.

Oscar Garcis Mata testified that he accompanied an individual dressed in an official Mexican uniform to petitioners' store (T. 24).[1] The Mexican man paid for and received the weapon directly from Valerio Santos (T. 27-28). However, Mata signed the Firearms Transaction Record which reflected that he purchased a pistol (T. 26). Mata further testified as to two similar transactions involving himself, the Mexican, and Valerio Santos (T. 28-29). This evidence established that Valerio Santos knowingly sold a weapon to a person he knew or had reasonable cause to believe did not reside in Texas (Count One, 18 U.S.C. 922(b)(3)). Since the Firearms Transaction Record did not contain information about the actual purchases, Valerio Santos failed to keep the required records concerning the sale (Count Two, 18 U.S.C. 922(b)(5)). And because the record showed that someone other than the actual purchaser bought the weapon, Valerio Santos made a false record (Count Three, 18 U.S.C. 922(m)).

Aldofo Valdez (Counts Four, Five, Six; T. 45-46) and Francisco Mejia (Counts Seven, Eight, and Nine; T. 55-61) testified as to similar transactions involving Mexicans and Valerio Santos. Mejia testified as to 10 or 11 similar purchases not charged in the indictment (T. 73-74). Benito Perez testified that he attempted to purchase a weapon from Valerio Santos, but was informed that since he was a resident of Illinois, he would need

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[1] The store was owned by Valerio Santos; his son, Salvador, worked there (T. 279-280); "T." refers to the transcript of the proceedings in the trial court.

someone with a Texas driver's license to sign the form (T. 85-86). Later he brought with him Ramon Grimaldo and a purchase was completed in the manner described above (Counts Ten, Eleven and Twelve; T. 86-92). Mr. Grimaldo corroborated the testimony of Mr. Perez (T. 97-97G). Several other witnesses testified about past similar transactions with Valerio Santos, which were not charged in the indictment (T. 116-128, 144-154, 164-177).

Francisco Mejia testified about a similar transaction with Salvador Santos as the vendor of the weapon (Counts Thirteen, Fourteen, and Fifteen; T. 63-67). Salvador Santos was charged with aiding and abetting a licensed firearms dealer.

In all of these transactions petitioners used the same *modus operandi*. A citizen of Texas accompanied an out of state purchaser who chose and paid for the weapon; the local citizens were named as purchasers on the Firearms Transaction Records. Although only Mr. Perez actually stated he was from out of state (T. 85-86), in all of the transactions the circumstances were such that the jury could properly find that petitioners either knew or had reasonable cause to believe that the actual purchasers were not residents of Texas.

The evidence on the conspiracy count (Count Sixteen) includes the numerous sales by Valerio Santos and the sale by Salvador Santos. Salvador Santos testified that his father, Valerio, had given him instructions on how to make firearms sales, although he claimed he was instructed to comply with the law (T. 282). This evidence was sufficient to show that Valerio Santos and his son conspired to have Salvador make illegal sales of weapons when he was running his father's store.

2. Petitioners contend that the persons who falsely signed as purchasers on the Firearms Transaction Records were accomplices of petitioners and that it was error for the trial court to fail to give a cautionary instruction as to their testimony. However, the purchasers were not accomplices because they could not have been indicted for the same crime as petitioners. *United States* v. *Nolte*, 440 F. 2d 1124 (C.A. 5), certiorari denied, 404 U.S. 862; *Risinger* v. *United States*, 236 F. 2d 96 (C.A. 5); See also *United States* v. *Farrar*, 281 U.S. 624 (purchaser of alcohol not liable under statute making it a crime to sell alcohol) and *Emmanuel* v. *United States*, 24 F. 2d 905 (C.A. 5), certiorari denied, 278 U.S. 643 (one who is brought into the country illegally is not liable under a statute making it a crime to bring a person into the country illegally). The cases cited by petitioners (Pet. 7) hold that one can be an accomplice where he could not have been a principal, but they were not criminal transactions necessarily involving two parties. In such a case where a particular criminal statute makes criminal the conduct of only one of the parties, the other party cannot be an accomplice. *United States* v. *Farrar, supra;* LaFave and Scott, *Criminal Law* 521 (1972); Perkins, on *Criminal Law* 621 (2d ed. 1969). As to the conspiracy conviction, there was no evidence of an agreement between the government witnesses and petitioners to violate the gun control.

Even if the purchasers were accomplices, it was not error for the court to fail to give a cautionary instruction on its own motion where petitioners' counsel did not request the trial court to give such a charge (Pet. 2). Following the charge, the court asked petitioners' counsel whether he had any additional requests or objections or exceptions. The defense attorney stated that he had none, and that he was satisfied with the charge as given (T.

404-405). Moreover, the testimony of each government witness was substantially corroborated by other government witnesses as to the procedure utilized by petitioners to make illegal sales. In addition, the documentary evidence (Firearms Transaction Records used in the purchases) further corroborated the testimony of the government witnesses. Where the testimony of an alleged accomplice is corroborated, the instruction on accomplice testimony is not required, *McDonald* v. *Sheriff*, 422 F. 2d 839 (C.A. 5); *Christy* v. *United States*, 261 F. 2d 357 (C.A. 9), certiorari denied, 360 U.S. 919.[2]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[2] The cases cited by petitioners are inapposite (Pet. 7). In *United States* v. *Birmingham*, 447 F. 2d 1313 (C.A. 10), where accomplice testimony was involved, the court gave an instruction that the witnesses were presumed to be telling the truth; the court of appeals reversed on the ground that the instruction violated the accused's presumption of innocence. In *United States* v. *Owens*, 460 F. 2d 268 (C.A. 10), the testimony of the accomplice was uncorroborated.